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Clerk
District Court

JUL 28 2005

For The Northern Mariana Islands
By _____
(Deputy Clerk)

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and Hongkong Entertainment (Overseas) Investment Ltd.*

IN THE DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

ELENITA S. SANTOS and
ANGEL SANTOS

Plaintiff,

vs.

HONGKONG ENTERTAINMENT
(OVERSEAS) INVESTMENT LTD .dba,
TINIAN DYNASTY HOTEL & CASINO and
CENTURY INSURANCE CO., LTD.

Defendants.

Civil Action No. 04-0030

DEFENDANT'S OPPOSITION
TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY
JUDGMENT

Date : August 11, 2005

Time : 8:00 a.m.

Judge : Tashima, Sr. Circuit Judge

COMES NOW, Century Insurance Co., Ltd and Hongkong Entertainment (Overseas) Investment Limited by through counsel Colin M. Thompson to oppose Plaintiffs' Motion for Partial Summary Judgment.

I.
INTRODUCTION

By her motion for Partial Summary Judgment, Mrs. Santos hopes to establish liability and obtain an order that "she is due Judgment as matter of law". Motion for Partial Summary Judgment (Motion) Page 1, lines 25-26. Plaintiff goes on to say that "[t]he lack of handrail caused Mrs. Santos

1 to fall and she is now permanently injured". Motion at Page 1, lines 27-28. Defendants do not
 2 dispute that Mrs. Santos fell on a stairway at Tinian Dynasty, that she was injured and that the
 3 stairway had no handrails. However, as a matter of law, these undisputed facts do not lead to the
 4 conclusion that Plaintiff is entitled to Judgment. Not only are there disputed issues about whether
 5 Tinian Dynasty met or breached the standard of care due Mrs. Santos, there are disputed issues as to
 6 the proximate cause of Mrs. Santos injuries.¹ Based on the limited facts available at this time,
 7 Summary Judgment should not be granted.

9 The Plaintiff's motion is premature. At this stage in the litigation, Defendants have yet to
 10 respond to the Second Amended Complaint.² No depositions have taken place.³ Expert Disclosures
 11 have not yet occurred. In sum, a sufficient factual record has yet to be developed and summary
 12 Judgment at this stage would unfairly prejudice Defendants. Accordingly, Defendants seek
 13 dismissal of Plaintiff's motion or, in the alternative, a continuance, pursuant to Federal Rules of
 14 Civil Procedure Rule 56(f).

16 Finally, the limited evidence presented by the Plaintiff subject to consideration by this court
 17 is insufficient to satisfy Plaintiffs burden. Much of Plaintiff's evidence is inadmissible.⁴ Any
 18 evidence remaining for the Court to consider lacks sufficient weight to support a Judgment in favor
 19 of Plaintiff.

21 II.

22 **THE MOTION FOR SUMMARY JUDGMENT IS PREMATURE**

23 Federal Rule of Civil Procedure Rule 56(f) provides:

24 When Affidavits are Unavailable. Should it appear from the affidavits
 25 of a party opposing the motion that the party cannot for reasons stated
 present by affidavit facts essential to justify the party's opposition, the

26 ¹ The ultimate determination of whether a particular negligent act is the proximate cause of a resulting injury is a
 question of fact for the jury. *Doggett v. United States*, 875 F.2d 684, 692 (9th Cir. 1989)

27 ² Defendant respectfully request that the Court take Judicial Notice of the pleadings and papers on file.

28 ³ Although depositions have been scheduled, none have actually occurred. The Parties have cooperated in scheduling of
 depositions. No dilatory motive should be imputed to either party.

⁴ Please see Motion to Strike Evidence filed concurrently with this opposition.

1 court may refuse the application for judgment or may order a
2 continuance to permit affidavits to be obtained or depositions to be
taken or discovery to be had or may make such other order as is just.

3 Although this case was filed at the end of last year, the proceedings are at an early stage. No
4 depositions have taken place nor have expert disclosures. Essential evidence has yet to be
5 discovered. Please see Declaration of Alfred Yue filed concurrently with this opposition. *Inter alia*,
6 expert opinion is necessary to the determination of the proximate cause of Mrs. Santos' injuries. The
7 Plaintiff brings this motion for summary judgment prematurely. When a party is unable to present
8 facts by affidavit which are essential to support its opposition to summary judgment, the court may
9 properly refuse the application for judgment or may order a continuance to permit affidavits to be
10 obtained or depositions taken. Com. R. Civ. Pro. 56(f). Here, as set forth in the Declaration of
11 Alfred Yue, facts essential to the defense of this motion cannot be presented by affidavit. It will be
12 necessary to establish these facts through discovery.
13
14

15 The rule's purpose:

16 "is to provide an additional safeguard against an improvident or
17 premature grant of summary judgment...." 10A C. Wright & A.
18 Miller, Federal Practice and Procedure §2740 (West 1996).
19 Accordingly, the courts apply the rule "with a spirit of liberality". Id.
20 A Rule 56(f) declaration "need not contain evidentiary facts going to
the merits of the case; rather, it is merely a sworn statement
explaining why these facts cannot be presented". Id.

21 In cases like the one at bar, this court should freely grant Defendant's motion to continue this
22 motion in order to allow full discovery to take place.

23 "Where, however, a summary judgment motion is filed so early in the
24 litigation, before a party has had any realistic opportunity to pursue
25 discovery relating to its theory of the case, **district courts should**
26 **grant any Rule 56(f) motion fairly freely**. See *Metabolife Int'l, Inc.*
27 *v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) ("Although Rule 56(f)
28 facially gives judges the discretion to disallow discovery when the
non-moving party cannot yet submit evidence supporting its
opposition, **the Supreme Court has restated the rule as requiring,**
rather than merely permitting, discovery 'where the non-moving
party has not had the opportunity to discover information that is

essential to its opposition.' ") (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)); see also *Berkeley v. Home Ins. Co.*, 314 U.S. App. D.C. 358, 68 F.3d 1409, 1414 (D.C. Cir. 1995) (describing "the usual generous approach toward granting Rule 56(f) motions"); *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 919 n.4 (5th Cir. 1992) (Rule 56(f)-based "continuance of a motion for summary judgment for purposes of discovery **should be granted almost as a matter of course** unless the non-moving party has not diligently pursued discovery of the evidence" (internal quotation marks and citation omitted)); *Sames v. Gable*, 732 F.2d 49, 52 (3rd Cir. 1984) (same). *Burlington Northern & Santa Fe Ry. Co. v. The Assiniboine*, 323 F.3d 767, 773-774 (9th Cir., 2003) (Emphasis added)

The state of discovery in this case makes it especially appropriate to continue this hearing until meaningful discovery can take place.

III. **SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE OF PLAINTIFFS' FAILURE TO MEET ITS BURDEN.**

The Commonwealth Courts have set forth the elements of a negligence claim. "Negligence is a breach of a duty owed to another which breach proximately results in an injury and is the cause in fact of an injury to one for which the duty was owed". *Gower v. Commonwealth*, 3 CR 211 (Dist. Ct. App. Div. 1986); *San Nicolas v. Commonwealth*, 1 CR 144 (Dist. Ct. App. Div. 1981). As a general matter, summary judgment is not appropriate in negligence cases because the issue of proximate cause is one for the jury to decide. "The ultimate determination of whether a particular negligent act is the proximate cause of a resulting injury is a question of fact for the jury. *Doggett v. United States*, 875 F.2d 684, 692 (9th Cir. 1989). Therefore, summary judgment is denied as to this issue". *Grizzard v. Mogambo, Inc.*, Civ. No. 95-0657 (Order Denying Elm's Inc's Motion for Summary Judgment). Commonwealth law is consistent with that of the Ninth Circuit "The existence and extent of a duty of care are questions of law but whether such a duty has been breached and whether proximate cause exists are questions for the fact finder, whose determination is binding on appeal unless clearly erroneous." *Foss v. United States*, 623 F.2d 104 (9th Cir. 1980). *Armstrong v.*

1 *United States*, 756 F.2d 1407, 1409 (9th Cir., 1985) Therefore, without going further and based on
2 the substantive law of the Commonwealth, summary judgment should be denied.

3
4 Assuming *arguendo* that the Court should decide the issues of breach of duty and/or
5 proximate cause, it is clear that Plaintiff has failed to show the absence of a genuine issue of material
6 fact as to whether the lack of a handrail on the stairway was the proximate cause of Mrs. Santos'
7 injuries or whether Tinian Dynasty breached its duty of care.

8
9 Proximate cause is the legal cause of an injury and an essential element of negligence. The
10 Commonwealth Superior Court has defined proximate cause as follows:

11 “In addition, under common law a person who has sustained injuries
12 due to the negligent conduct of another may recover from the
13 tortfeasor, provided that the negligent behavior was the proximate
14 cause of the injuries suffered. *Baker v. City of Garden City*, 731 P.2d
15 278 (Kan. 1987); *Petersen v. State*, 671 P.2d 230 (Wash. 1983);
16 Restatement (Second) of Torts § 281 (1965). The “proximate cause”
17 of an accident is any direct and immediate cause without which the
18 accident would not have occurred. *Sumner v. Amacher*, 437 P.2d 630
(Mont. 1968). Said another way, the conduct is not a proximate cause
of plaintiff’s injury if an event would have occurred regardless of
defendant’s conduct. *Litts v. Pierce County*, 515 P.2d 526 (Wash. Ct.
App. 1973).” *Basaldua v. Hobie Cat Company*, Civ. No. 94-0487,
(Order Granting Motion to Dismiss) September 11, 1996.

19 Here, the plaintiff has not shown an absence of material fact as to proximate cause. The only
20 evidence relating to the cause of Mrs. Santos fall comes from her own declaration which states that
21 “[a]s I was walking down the stairs, I began to lose my footing and reached for a handrail to steady
22 myself. There was no handrail and as a consequence, I fell and broke my leg.” What caused Mrs.
23 Santos to lose her footing? Was she exercising due care? Was her footwear in good and safe
24 condition? Would she have fallen even if there was a handrail? In sum, what was the proximate
25 cause of her fall? This is for the jury to decide.
26
27
28

1 Did Tinian Dynasty Breach its duty of care? This question presents a genuine issue
2 of material fact. Restatement (Second) of Torts § 343A(1) (1965) which states that a:

3 "possessor of land is not liable to his invitees for physical harm caused
4 to them by any activity or condition on the land whose danger is
5 known or obvious to them, unless the possessor should anticipate the
6 harm despite such knowledge or obviousness."

7 Section 343A also defines a dangerous condition as "obvious" where "both the condition and the risk
8 are apparent to and would be recognized by a reasonable man, in the position of the visitor,
9 exercising ordinary perception, intelligence, and judgment." Restatement (Second) of Torts § 343A
10 cmt. 1(b). In light of the evidence before this court, there is a genuine issue of material fact as to
11 whether Mrs. Santos was aware of the absence of the handrail. In *Van DeVeer*, the court found that
12 the plaintiff was aware that the stairs had no handrail. *Van DeVeer*, 101 S.W.3d at 884. Was Mrs.
13 Santos aware that the stairs had no handrail? This question presents a genuine issue of material fact.
14 In sum, Plaintiff has failed to meet her burden and Summary Judgment should be denied.
15

16
17 **IV.**
PLAINTIFFS PRESENTED NO DIRECT EVIDENCE OF A BUILDING CODE
VIOLATION.

18
19 Plaintiffs do not offer this court evidence in the form of affidavit or otherwise that defendant
20 Tinian Dynasty violated the Building Code. Dr. Firestone's declaration merely recites his
21 measurements of the stairs and states that the stairs were without handrails. The Plaintiff wishes this
22 Court to infer that there was a building code violation. But, inferences must be drawn in favor of the
23 non-moving party. Under summary judgment standard, evidence of non-movant is to be believed
24 and all justifiable inferences are to be drawn in his favor. *Mallinckrodt Inc. v Masimo Corp.* (2003,
25 CD Cal) 293 F Supp 2d 1102. Thus, it would be improper for this court to infer that Tinian Dynasty
26 violated the building code. Furthermore, Tinian Dynasty has submitted evidence in the form of
27 Alfred Yue's declaration showing that the Tinian Dynasty: (1) has never been cited for a building
28

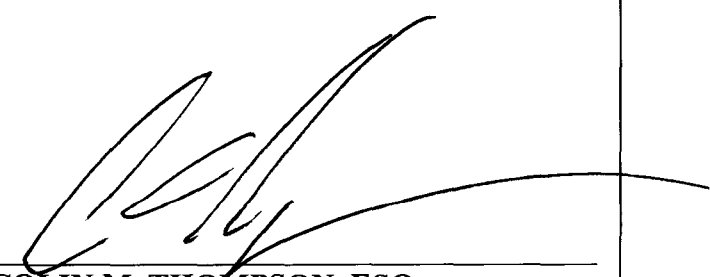
1 code violation relating to the absence of a handrail on the stairway that is the subject of this lawsuit;
2 (2) was issued a certificate of occupancy for the Hotel that was valid at all times relevant to the
3 instant complaint; (3) maintains policies and procedures for the safety and protection of our hotel
4 guests to protect them from unreasonable risk of harm; and (4) Tinian Dynasty has no knowledge of
5 anyone other than Mrs. Santos, ever falling on the stairway that is the subject of this lawsuit.
6

7 Assuming arguendo that Plaintiffs evidence has established a building code violation,
8 Plaintiff has failed to produce any evidence that the violation was not excused. The Restatement
9 (Second) of Torts § 288A provides that “an excused violation of legislative enactment of an
10 administrative regulation is not negligence” It is the moving party’s burden to prove the absence of
11 excuse if they are to succeed in this motion. They have failed to produce any evidence on this issue
12 and there motion must be denied.
13

14 **V.**
15 **CONCLUSION**

16 Based on the foregoing, Defendants respectfully request that the Court deny Plaintiffs’
17 Motion for Partial Summary Judgment or continue this hearing to allow further discovery and
18 briefing.
19

20 Dated this 28th day of July 2005.
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23 **COLIN M. THOMPSON, ESQ.**
24 Attorney for Century Insurance Co. Ltd
25 and Hongkong Ent. (Overseas) Investment, Ltd.
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